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IN THE COURT OF APPEALS OF INDIANA

JPMORGAN CHASE BANK, N.A., SUCCESSOR BY MERGER WITH BANK ONE, N.A.,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 02A03-0801-CV-18
RITA E. NICHOLSON F/K/A RITA CAMPBELL, EVERHOME MORTGAGE COMPANY, and JOHN DOE and/or JANE DOE, as the occupants,	)	
Appellees-Defendants,	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0505-MF-262

August 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

JPMorgan Chase Bank, N.A., successor to Bank One, N.A. ("Chase Bank"), appeals a partial summary judgment ruling in a consolidated action involving complaints by Chase Bank and EverHome Mortgage Company, successor to Nexstar Financial Corporation ("EverHome"), seeking to foreclose upon real estate mortgaged by Rita Nicholson f/k/a Rita Campbell ("Nicholson"). Chase Bank raises the sole issue of whether the trial court erred in granting partial summary judgment to EverHome and declaring that Chase Bank's interest in the property is subordinate to EverHome's in the ensuing judgment of foreclosure. Concluding that EverHome was not entitled to summary judgment, we reverse and remand.

Facts and Procedural History

The facts as recounted in an earlier appeal of this case are as follows:

> On March 28, 2001, Nicholson, who owned real estate located at 2045 Elyetta Street in Fort Wayne, Indiana, obtained a home equity line of credit from Bank One, predecessor to Chase Bank, in the original principal amount of $47,500.00. Bank One recorded its mortgage on April 6, 2001. On May 23, 2001, Nicholson obtained an additional mortgage loan from Bank One in the original principal amount of $69,700.00. Bank One recorded its mortgage on June 6, 2001.
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> On August 24, 2001, Nicholson obtained a mortgage loan from Nexstar Mortgage in the amount of $70,000.00. At the closing on August 24, 2001, Three Rivers Title Company, Inc., acting upon instructions from Bank One, tendered funds to reduce the two Bank One mortgages to a zero balance. Bank One's mortgage lien recorded in June 2001 was released, but the earlier mortgage lien was not released. The home equity line of credit was not closed. Nexstar Mortgage recorded its mortgage on August 30, 2001.
>
> On September 13, 2001, Nicholson obtained another home equity line of credit from Bank One in the original principal amount of $19,250.00. Bank One recorded its mortgage lien on September 24, 2001. Apparently, Nicholson obtained other funds by using the home equity line of credit issued in March of 2001, which remained open after the August 24, 2001 closing.
>
> Nicholson became delinquent in her monthly payments to her creditors. On June 30, 2005, Chase Bank, as successor to Bank One, filed a foreclosure

> complaint in the Allen County Superior Court, naming Nexstar Financial Corporation and Nicholson as defendants. On July 19, 2005, EverHome, as the successor to Nexstar Financial Corporation, filed a foreclosure complaint in the Circuit Court of Allen County, naming Chase Bank and Nicholson as defendants. On September 23, 2005, the cases were consolidated for trial in the Allen County Superior Court.
>
> On May 2, 2006, EverHome filed a motion for partial summary judgment, asserting that its mortgage lien was superior to that of Chase Bank. EverHome contended that the first two Chase Bank loans were paid off at the August 24, 2001 closing, but Chase Bank failed to properly release one lien in the office of the Recorder of Allen County. On June 28, 2006, EverHome filed its "Amended Motion for Summary Judgment," requesting summary judgment "as to all issues and all Defendants." Chase Bank responded on June 30, 2006, contending that the 2001 home equity line of credit could not have been closed absent the express request of Nicholson. On September 11, 2006, the trial court conducted a summary judgment hearing.
>
> On October 16, 2006, the trial court granted partial summary judgment in favor of EverHome, based upon the equitable theories of implied contract and estoppel.

JPMorgan Chase Bank, N.A. v. EverHome Mortgage Co., No. 02A03-0611-CV-539, slip op. at 2-4 (Ind. Ct. App., May 17, 2007) (citations omitted).[1]

Chase Bank appealed the trial court's October 16, 2006, order. This court held that because the trial court had determined "that EverHome held a lien superior to that of Chase Bank, but did not order foreclosure or determine the amount of Nicholson's liability, if any, to Chase Bank and Everhome," id. at 5, Chase Bank and EverHome had outstanding claims against Nicholson and the trial court's order was interlocutory. The appeal was dismissed because Chase Bank attempted to appeal an interlocutory order as a final judgment without certification. Id. at 6.

The trial court then entered a Judgment of Foreclosure, finding EverHome's lien superior to all other liens and granting judgment to EverHome and Chase Bank against

Nicholson. Chase Bank then initiated this appeal. Additional facts will be supplied as necessary.

Discussion and Decision

I. Summary Judgment Standard of Review

Summary judgment is appropriate when the evidence shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). On appeal, the trial court's order granting or denying a motion for summary judgment is cloaked with a presumption of validity, and the party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous. Cinergy Corp. v. St. Paul Surplus Lines Ins. Co., 873 N.E.2d 105, 110 (Ind. Ct. App. 2007), trans. denied. We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Id. Our review of a summary judgment motion is limited to those materials designated to the trial court. Drees Co., Inc. v. Thompson, 868 N.E.2d 32, 38 (Ind. Ct. App. 2007), trans. denied.

II. Lien Priority

The documents in question between Nicholson and Chase Bank contain the following key provisions:

> [Chase Bank] Home Equity Line of Credit
> Agreement and Disclosure Statement
> * * *
> Credit Limit. This Agreement covers a revolving line of credit for the principal amount of [$47,500.00], which will be your "Credit Limit" under this

[1] For ease of reference, from this point on the opinion will refer only to Chase Bank and EverHome to encompass both the past and present entities involved in the various transactions.

Agreement. During the Draw Period we will honor your request for credit advances . . . . You may borrow against the Credit Line, repay any portion of the amount borrowed, and re-borrow up to the amount of the Credit Limit.
* * *
Conditions Under Which Other Charges May Be Imposed. You agree to pay all other fees and charges related to your Credit Line as set forth below:
* * *
Other Charges. Your Credit Line Account may be charged the following other charges:
Fee to Close Account. Your Credit Line Account may be charged [$250.00] if you close or terminate your Credit Line Account within three (3) years of the Loan Date shown above. You will not be charged this fee if Lender suspends or terminates your Credit Line Account. You may prepay your Credit Line Account as noted in the Prepayment section of this Agreement without paying this fee as long as you do not close your account.
* * *
Cancellation by you. If you cancel your right to credit advances under this Agreement, you must notify us and return all credit line checks and any other access devices to us. Despite cancellation, your obligation under this Agreement will remain in full force and effect until you have paid us all amounts due under this Agreement.
Prepayment. You may prepay all or any amount owing under this Credit Line at any time without penalty, except we will be entitled to receive all accrued FINANCE CHARGES and other charges, if any.

Appellant's Appendix at 78-81.

Mortgage
* * *
REVOLVING LINE OF CREDIT. . . . [W]ithout limitation, this Mortgage secures a revolving line of credit, which obligates lender to make future obligations and advances to Grantor up to a maximum amount of $47,500.00 so long as Grantor complies with all the terms of the Credit Agreement. . . .It is the intention of Grantor and Lender that this Mortgage secures the balance outstanding under the Credit Agreement from time to time from zero up to the Credit Limit as provided in this Mortgage and any intermediate balance.
* * *
FULL PERFORMANCE. If Grantor pays all the indebtedness when due, terminates the credit line account, and otherwise performs all the obligations imposed upon Grantor under this Mortgage, Lender shall execute and deliver to Grantor a suitable satisfaction of this Mortgage and suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and the Personal Property.

Id. at 7-11.

Chase Bank contends that because Nicholson was required by the terms of the line of credit agreement to notify Chase Bank if she intended to cancel the account, but did not do so, it was not required to close the line of credit and release the mortgage after the EverHome closing and the trial court therefore erred in finding that EverHome's lien had priority. In Bank of America, N.A. v. Ping, 879 N.E.2d 665 (Ind. Ct. App. 2008), we addressed a similar issue on similar facts: property owner Ping had a revolving line of credit with Bank One secured by a mortgage on her property. Approximately two years later, Ping borrowed money from Bank of America, secured by a mortgage on her property, and a portion of the proceeds of the loan was used to pay the entire outstanding balance on the Bank One line of credit. "Bank One did not send 'correspondence or instructions' to Bank of America or Ping . . . [a]nd neither Ping nor Bank of America took any action to terminate" the line of credit. Id. at 668. Ping subsequently incurred additional debt under the line of credit. Bank of America later sued Ping and Bank One. The trial court found that Bank of America had either constructive or actual knowledge of the Bank One mortgage and that the Bank One mortgage was entitled to priority over the Bank of America mortgage. On Bank of America's appeal, we held that the Bank One mortgage required Ping to pay all indebtedness when due, terminate the credit agreement, and perform all other obligations before it was required to release the mortgage. Neither Ping nor Bank of America took any affirmative act to terminate the credit agreement, and "[a]bsent documentation to the contrary, we decline to hold that merely to pay off an outstanding balance is sufficient to terminate a revolving line of credit . . . ." Id. at 670. Noting the nature of a revolving line of credit and the extrinsic

evidence of Ping and Bank One's intention for the Bank One mortgage to remain a lien despite a zero balance on the line of credit – that is, specific language in the mortgage, and Ping's withdrawal and Bank One's advance of additional funds after the Bank of America loan – we affirmed the trial court's decision that Bank One was entitled to priority over Bank of America. Id. at 672; see also Dreibelbiss Title Col, Inc. v. Fifth Third Bank, 806 N.E.2d 345, 349 (Ind. Ct. App. 2004) (holding that borrower and title company failed to meet bank's condition for release of mortgage securing line of credit when borrower, although signing a statement informing the bank she was submitting funds to satisfy the mortgage, failed to direct the bank in writing to close the line of credit), trans. denied.

Here, too, by the terms of the recorded mortgage, Nicholson was entitled to a release of the Chase Bank mortgage securing the line of credit only after she had paid all indebtedness, terminated the credit line, and otherwise performed all her obligations under the mortgage. Moreover, there is specific language in the mortgage indicating that the parties anticipate the line of credit may, from time to time, have a zero balance; the line of credit requires Nicholson to notify Chase Bank and return all credit line checks and other access devices if she wishes to cancel the line of credit, but she did not do so; and Nicholson withdrew and Chase Bank advanced funds from the line of credit after the EverHome closing.

EverHome contends that its designated evidence is "documentation to the contrary" of the general proposition that paying the balance down to zero is insufficient to terminate a revolving line of credit, distinguishing this case from Ping. EverHome's designated evidence includes: 1) a letter from Chase Bank to Nicholson, stating "Thank you for your recent

payoff quote request on the account referenced above," and showing a current balance of $0.00, "other charges" of $250.00, and a total payoff of $250.00, appellant's app. at 116; 2) a "Supplemental Sheet to Closing Instructions" from EverHome to the title company, stating "We have a relationship with [Chase Bank], their clients that go through [EverHome] for their mortgages do not receive a pre payment penalty, please send [Chase Bank] short pay deducting the penalty from the payoff amount when preparing the check, see following instruction from [Chase Bank]," id. at 117; 3) a "Loan Payoff/Prepayment Waiver" form from Chase Bank Loan Servicing showing a payoff amount of $0.00 and that the prepayment fee is to be waived, as well as a section entitled "Release of Lien Mailing Instructions" with the title company's address as the address to which the lien release should be forwarded, id. at 119; and 4) an e-mail exchange purportedly between representatives of Chase Bank and EverHome in which the Chase Bank representative writes, "Per previous discussions I have had with you, attached is the form to be used by closing agents when sending the payoff check to [Chase Bank] (paying off a [Chase Bank] Equity Loan) where there is an early payoff penalty involved," id. at 121. EverHome claims this evidence proves that Chase Bank and EverHome "both understood that EverHome intended to pay off and obtain a release of both of [Chase Bank's] outstanding mortgages . . . ." Brief of Appellee at 11.

In response, Chase Bank designated the affidavit of Nicole Zupan, a "Contested Specialist" with Chase Bank, in which Zupan states she has examined Nicholson's account and Chase Bank "did not receive any notification from Rita Nicholson, in writing or by any other means of communication, expressing her desire to close her line of credit resulting from the [March 28, 2001] Mortgage" nor did it "receive any credit line checks . . . or any other

access devices associated with said [Mortgage] that were to be returned if Nicholson wished to cancel her line of credit . . . ." Id. at 250-51.

The trial court found that:

> There was either a contract established between [EverHome] and [Chase Bank], that [Chase Bank] would accept a mortgage payoff placing [EverHome] in a superior lien position or, in the alternative, that [Chase Bank] should be promissorily estopped to deny the superiority of [EverHome's] mortgage lien insofar as it made representations to [EverHome] regarding the payoffs for Rita Nicholson such that [EverHome] should be placed in a superior mortgage lien position.

Appellant's App. at 269-70.

An implied contract is one that arises out of the acts and conduct of the parties coupled with a mutual agreement and intent to promise. Nationwide Ins. Co. v. Heck, 873 N.E.2d 190, 196 n.1 (Ind. Ct. App. 2004). An implied contract is equally as binding as an express contract: "If there has been a meeting of the minds and the clear intent of the parties to the transaction is evidenced by their acts and conduct viewed in the light of the surrounding circumstances, then the resultant implied contract differs from an express contract only in the mode of proof." McCart v. Chief Executive Officer in Charge, Indep. Fed. Credit Union, 652 N.E.2d 80, 85 (Ind. Ct. App. 1995) (quoting Retter v. Retter, 110 Ind. App. 659, 40 N.E.2d 385, 386 (1942)), trans. denied. The requirements for promissory estoppel are: 1) a promise by the promisor; 2) made with the expectation that the promissee will rely theron; 3) which induces reasonable reliance on the promise; 4) of a definite and substantial nature; and 5) injustice can be avoided only by enforcement of the promise. Brown v. Branch, 758 N.E.2d 48, 52 (Ind. 2001).

Chase Bank contends that the trial court erred in finding an implied contract for

release of the mortgage, asserting that it required authorization from Nicholson to close the line of credit account and the designated evidence fails to show that it agreed, by its conduct, to close the account in the absence of such authorization. EverHome responds that because the payoff statement sent by Chase Bank charged the $250 prepayment fee that would be charged only in the event the line of credit account was also closed, Chase Bank knew the account was to be closed and indicated its intention to release its mortgage lien when it received full payment. The only fact proven by the evidence designated by EverHome, however, is that Chase Bank agreed to waive the prepayment fee on Nicholson's line of credit account. EverHome characterizes the designated evidence as proving that Chase Bank "told EverHome to use the release forms it did – without Nicholson's signature – to get the [Chase Bank] Mortgage released." Brief of Appellee at 12. However, the evidence shows merely that EverHome requested a payoff quote from Chase Bank, EverHome and Chase Bank had a "relationship" whereby EverHome clients did not receive a prepayment penalty, and Chase Bank told EverHome to use the particular waiver forms "where there is an early payoff penalty involved." Appellant's App. at 122. This evidence does not necessarily prove that Chase Bank also agreed to waive the notification requirement and release the mortgage securing the line of credit. Nowhere in the correspondence between the parties is release of the lien mentioned.[2] Paying the line of credit balance down to zero was but one part of the "full performance" that would require Chase Bank to release the mortgage. We

[2] The Loan Payoff/Prepayment Waiver form does include a section entitled "Release of Lien Mailing Instructions" that states the "[l]ien release will be mailed to the address on the account unless otherwise indicated." Appellant's App. at 119. The title company handling the EverHome mortgage closing filled in that section with its contact information. That alone does not prove that the lien in this case was to be released, however. All it proves is that <u>if</u> the lien was to be released, the lien release should be mailed to the

note that at the time EverHome requested a payoff, Nicholson had not borrowed against the line of credit – the line of credit balance was already zero and unlike Bank of America in Ping, EverHome did not "pay the balance down to zero" at the closing. The financial transaction between EverHome and Chase Bank at the closing was with respect to the second Chase Bank mortgage. Construing the designated evidence in favor of Chase Bank as the non-movant, the fact that there was no financial transaction with respect to the line of credit raises a factual issue as to whether Chase Bank intended to close the line of credit account and release the mortgage by waiving the prepayment fee. Moreover, to require Chase Bank to release the mortgage securing the line of credit, the line of credit account must also have been terminated, and to do that, Nicholson was required to notify Chase Bank and return all credit line checks and other access devices; there is no designated evidence showing that she did so. To the extent there was an implied contract between Chase Bank and EverHome, the designated evidence proves only that it related to the prepayment penalty. The designated evidence is insufficient to prove as a matter of law any additional agreement between the parties with regard to release of the lien.

Chase Bank also contends that the trial court erred in finding Chase Bank was promissorily estopped from asserting priority of its lien, arguing that the designated evidence fails to show it made any representations to EverHome that it would release its lien or that EverHome was not in the best position to assure priority of its own lien. EverHome responds that it could not reasonably have been expected to comply with the termination requirements of the line of credit document because it was not a publicly recorded document. EverHome

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title company.

acknowledges, however, that the recorded mortgage states that it secures a line of credit and that the line of credit account must be terminated before Chase Bank is required to release the mortgage. Nonetheless, EverHome contends that the trial court was correct in finding that Chase Bank is estopped from asserting lien priority because if Chase Bank "had said it wanted to retain its mortgage, EverHome would not have made its loan," brief of appellee at 15, and therefore relied to its detriment on Chase Bank releasing its lien. We agree with Chase Bank that EverHome did not show by its designated evidence that Chase Bank made a representation that it would release its lien. Although EverHome states that it requested Chase Bank "to provide payoff statements, detailing all of [Chase Bank's] requirements to release its mortgages," id. at 15, evidence of that request does not appear in the record.[3] The only evidence in the record relating to this point is Chase Bank's response to EverHome's "payoff quote request." Appellant's App. at 116. EverHome knew, via the recorded mortgage, that Nicholson was required to terminate her line of credit; Nicholson was aware, via the terms of the line of credit itself, that she had to notify Chase Bank of her intention to close the account and return all credit line checks and access devices. As the party seeking to secure lien priority, it was incumbent upon EverHome to ascertain what was required to secure release of Chase Bank's mortgage. Estoppel doctrines are based on the principle that "one who by deed or conduct has induced another to act in a particular manner will not be

[3] EverHome also designated the affidavit of Richard A. Schwartz, representative of the title company, in which he avers that the title company made a payoff request to Chase Bank and that "[w]hen a closing agent . . . requests a 'payoff' figure, it requests the amount the lender requires for a release of its mortgage and to completely satisfy the obligation of the borrower." Appellant's App. at 111. Again, that Chase Bank responded with a payoff figure is not inconsistent with its position that the remainder of the obligations under the line of credit and mortgage documents had to be satisfied in order to secure release of the mortgage.

permitted to adopt an inconsistent position, attitude, or course of conduct that causes injury to such other." Brown, 758 N.E.2d at 52. Here, the designated evidence shows that Chase Bank promised not to charge a prepayment penalty; it does not show that Chase Bank induced EverHome to make a loan to Nicholson and pay off her previous obligations with a promise to release its lien and then adopted the inconsistent position of failing to do so.

Conclusion

The trial court erred in granting summary judgment to EverHome because there remains a genuine issue of material fact as to whether Chase Bank was required to release its mortgage lien on Nicholson's property. Accordingly, the judgment of the trial court is reversed, and this case is remanded to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

BAKER, C.J., and RILEY, J., concur.